

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
ROBERT J. GLADWIN, JUDGE

DIVISION II

CACR06-1320

JUNE 20, 2007

JAMES RYAN

APPELLANT

APPEAL FROM THE PULASKI  
COUNTY CIRCUIT COURT  
[NO. CR-2004-4561]

V.

HON. MARION HUMPREY,  
JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

Appellant James Ryan appeals his first-degree murder conviction from an April 7, 2006, Pulaski County Circuit Court jury trial. He contends on appeal that the trial court erred by denying his motion to suppress and by allowing his taped statement to be played for the jury. We affirm the circuit court's decision.

During the investigation of the murder of Jason McDonald, police identified appellant as a suspect. At the same time, appellant was a suspect in a burglary case because he had returned some stolen property to the owner. Police issued a warrant for appellant's arrest in the burglary case on September 8, 2005, and, in the midst of investigating the homicide, police arrested appellant on the burglary warrant. Appellant was questioned regarding the theft first, then later he was questioned regarding the homicide. He admits to having been

Mirandized and claims that he repeatedly asked for an attorney after he was given a polygraph test. Appellant was kept in a holding cell overnight, and the following day he requested in writing to speak with Captain Kirk Lane. Appellant then gave a statement confessing to the murder of Jason MacDonald. This statement was tape recorded and entered into evidence at the jury trial over appellant's objection. The theft-by-receiving charge, which resulted from the burglary investigation, was nol-prossed by the State. On April 7, 2006, a jury found appellant guilty of murder in the first degree and sentenced him to thirty years' imprisonment in the Arkansas Department of Correction. This appeal follows.

In reviewing a circuit court's denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the circuit court and proper deference to the circuit court's findings. *Yarbrough v. State*, \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (May 10, 2007) (citing *Mann v. State*, 357 Ark. 159, 161 S.W.3d 826 (2004)). We reverse only if the circuit court's ruling is clearly against the preponderance of the evidence. *Id.* (citing *Laime v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001)). The evaluation of the credibility of witnesses who testify at a suppression hearing about the circumstances surrounding an appellant's custodial confession is for the trial judge to determine, and this court defers to the position of the trial judge in matters of credibility. *Montgomery v. State*, 367 Ark. 485, \_\_\_ S.W.3d \_\_\_ (2006). Conflicts in the testimony are for the trial judge to resolve, and the judge is not

required to believe the testimony of any witness, especially that of the accused, since he or she is the person most interested in the outcome of the proceedings. *Id.*

In his first point on appeal, appellant challenges the trial court's denial of his motion to suppress statements he gave to officers, asserting that his arrest on an unrelated theft warrant was merely a pretext so that the officers could question him about the murder. Appellant argues that pretext must be a matter of the arresting officer's intent, and intent must be determined by the circumstances of the arrest. *Richardson v. State*, 288 Ark. 407, 706 S.W.2d 363 (1986). Appellant claims that "but for" the homicide investigation, he would not have been arrested for theft-by-receiving.

Appellant sets forth four contentions regarding his pretextual-arrest argument. First, appellant claims that the affidavit submitted for the arrest warrant in the theft case does not allege that he committed a crime because returning stolen property to the owner is not a crime. Further, under Ark. Code Ann. § 5-36-106(d), appellant argues that to return stolen property to the owner is a defense to the prosecution of theft-by-receiving. Appellant argues that the author of the affidavit knew that Jason McDonald, the murder victim, was the prime suspect in the theft case and that the affidavit was misleading. Appellant argues that "but for" the homicide investigation, the affidavit would never have been written.

Second, appellant argues that Rule 7.1 of the Arkansas Rules of Criminal Procedure was not followed, in that the rule allows a summons for a misdemeanor unless violence or bodily injury is involved or if it appears that the defendant would not respond to a summons. Appellant claims that under Rule 7.1, a warrant should not have been issued, and "but for"

the homicide investigation, a summons would have been used to notify the appellant of the charge. Third, appellant claims that three undercover police units took him into custody at gunpoint. He argues that “but for” the homicide investigation, the manpower and coercive manner used to arrest him would not have occurred.

Fourth, appellant argues that his arrest on the theft charge was a sham because instead of being released after being questioned about the theft-by-receiving charge, he was handcuffed and held incommunicado for an hour. He contends that, at that point, he was questioned about the homicide. He claims that he was never told he was free to leave, and instead was asked to take a polygraph. He claims that he was held until 10:00 p.m. before being given the polygraph test, and when he suggested he might come back in the morning, he was told he was not allowed to leave. When he told the officer he was tired and might want a lawyer, the questioning stopped. He was held in the county jail overnight. He claims that it was only after he was illegally held for twenty hours on the theft charge that he gave the statement that was played for the jury at his murder trial. He argues that these facts show that his arrest on the theft charge was a pretext used as an excuse to get him into custody and question him about the homicide.

The State argues that it was not necessary for appellant to be under arrest on another charge in order for the officers to question him about the murder. The police had information that appellant and McDonald had had a dispute over McDonald’s work as a police informant and that appellant was seen driving McDonald’s truck shortly after

McDonald was reported missing. We agree that these facts gave police reasonable suspicion to question appellant wholly apart from the unrelated theft warrant.

The State further argues that the appellant's arrest on the theft warrant was not pretextual. The police had reason to suspect appellant of murdering McDonald wholly apart from the theft warrant, and any questions that appellant raised about the circumstances and time of the issuance of the warrant do not matter. *See Weaver v. State*, 305 Ark. 180, 806 S.W.2d 615 (1991) (where the supreme court held that officers had grounds to detain Weaver for a reasonable time under Ark. R. Crim. P. 3.1, and that the traffic warrant, which might have been pretextual in other circumstances, was not necessary for Weaver's detention based on other evidence connecting Weaver to the murder). We agree that based upon the evidence connecting appellant to McDonald's murder, police had grounds to detain appellant.

The State claims that, as in *Stephens v. State*, 342 Ark. 151, 28 S.W.3d 260 (2000), *cert. denied*, 531 U.S. 1999 (2001), an ulterior motive does not render an arrest pretextual when there is a valid overt reason to make the arrest, such as an outstanding arrest warrant. As such, the Fourth Amendment and the exclusionary rule do not come into play as the arresting officer had both an outstanding warrant and the authority under Ark. R. Crim P. 2.2. Therefore, we hold that the validity of the arrest warrant did not depend on whether appellant would ultimately be convicted of the theft; the only requirement was that the police had probable cause to believe that the offense occurred. *E.g., Kimery v. State*, 63 Ark. App. 52, 973 S.W.2d 836 (1998). Police had evidence that appellant had been identified by the victim of the theft as the man who returned the stolen property. Further, appellant had been vague

about where he had obtained the property he returned. Whether he was actually guilty of the theft or had a valid defense to that charge was for a jury or court to decide and not the officer who signed the affidavit.

Appellant also argues in his first point on appeal that the statement he gave during his arrest was inadmissible because it was given involuntarily. *Roderick v. State*, 288 Ark. 360, 705 S.W.2d 433 (1986). In *Williams v. State*, 363 Ark. 395, 214 S.W.3d 829 (2005), the supreme court noted the following:

[A] statement made while in custody is presumptively involuntary, and the burden is on the State to prove by a preponderance of the evidence that a custodial statement was given voluntarily and was knowingly and intelligently made. *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003). In order to determine whether a waiver of Miranda rights is voluntary, we look to see if the confession was the product of free and deliberate choice rather than intimidation, coercion, or deception. *Id.* When we review a trial court's ruling on the voluntariness of a confession, we make an independent determination based on the totality of the circumstances. *Id.*

*Williams*, 363 Ark. at 404-5, 214 S.W.3d at 834-5. Appellant argues that his spirit had been broken by his long hours in custody and that his statement was not a product of his free will.

The State claims that appellant's argument that he was not allowed to leave the police station was not raised at the trial court level and is barred, therefore, on appeal. *E.g.*, *Walters v. State*, 358 Ark. 439, 193 S.W.3d 257 (2004). We agree and do not address this issue.

Appellant contends in his second point on appeal that the trial court erred in allowing his taped statement to be played to the jury because his responses were inaudible. The appellant claims that this issue was brought to the trial court's attention prior to the statement being played for the jury. The trial court overruled the objection and after the statement was played, the appellant asked for a mistrial, which the trial court denied. Appellant admits that

the general rule is that a recording is admissible unless the inaudible portions are so substantial as to render the recording as a whole untrustworthy. *Hamm v. State*, 301 Ark. 154, 782 S.W.2d 577 (1990). The appellant claims that his answers could not be heard, and that they were key to his statement. Therefore, the appellant argues that the recording was untrustworthy and the trial court abused its discretion in allowing the tape to be played for the jury.

The trial judge specifically ruled that he could understand the statement and that it was intelligible enough to be admitted. This court will not reverse a trial court's ruling on the admission of evidence absent an abuse of discretion. *McClellan v. State*, 81 Ark. App. 361, 101 S.W.3d 864 (2003). There is no basis to conclude that the trial court abused its discretion in ruling the tape admissible.

Affirmed.

MARSHALL and MILLER, JJ., agree.